Federal Court  Cour fédérale

Date: 20221230

Docket: IMM-12752-22

Citation: 2022 FC 1803

Ottawa, Ontario, December 30, 2022

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

ABU HENA MOSTOFA KAMAL

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] Mr. Kamal seeks a stay of his removal to Bangladesh, scheduled for January 1, 2023. I am granting his motion. In the complex and unusual circumstances of this case, I find that Mr. Kamal has raised serious issues with respect to the enforceability of his exclusion order and the refusal of his deferral request. I am also of the view that his removal would cause irreparable harm that is not outweighed by the public interest in the prompt enforcement of the law.

I. Background

[2] Mr. Kamal is a citizen of Bangladesh. In 2018, at age 19, he came to Canada on a study permit and began studying computer science and business at Lakehead University in Thunder Bay. In 2020, however, he lost his source of funding and switched to Confederation College, where tuition fees are lower. He also took a break from his studies in the winter term of 2021. Throughout this period, which coincided with the COVID-19 pandemic, Mr. Kamal was employed at a Tim Horton's restaurant in Thunder Bay. His study permit expired on August 31, 2021.

[3] Mr. Kamal took many steps to regularize his status in Canada. In several cases, he made applications himself, without the benefit of legal advice. Some of these applications are interconnected in ways that cannot be fully analyzed here. I will only describe the two applications that are directly relevant to this motion.

[4] First, on June 26, 2021, Mr. Kamal applied for permanent residence under a public policy aimed at essential workers during the COVID-19 pandemic outside the health sector, in particular food services. This program is often known as "TR to PR pathway." Mr. Kamal's application is still outstanding. He received an acknowledgement of receipt only in June 2022. In July 2022, he made additional submissions supporting the application and requesting that humanitarian and compassionate [H&C] factors be taken into account to overcome any inadmissibility factors that would otherwise bar his application.

[5] Second, in January 2022, he applied for restoration of his visitor status. On August 3, 2022, this application was granted and his status was extended to September 2, 2022. On September 1, 2022, he applied for a further extension. However, the Minister now asserts that Mr. Kamal's status was restored in error.

[6] Mr. Kamal made other applications to remain in Canada. He sought a pre-removal risk assessment [PRRA], which was denied. His application for an open work permit was also denied. On November 10, 2022, he applied for a temporary residence permit [TRP]. This application is still outstanding.

[7] Meanwhile, on May 10, 2022, Mr. Kamal attended an interview with a Canada Border Services Agency [CBSA] officer, who issued an exclusion order against him, for remaining in Canada at the end of the period authorized for his stay. On December 1, 2022, Mr. Kamal received a direction to report at Pearson Airport on January 1, 2023 for his removal.

[8] On December 6, 2022, Mr. Kamal asked a CBSA officer to defer his removal. While this request was pending, he brought an application for leave and judicial review and a motion for a stay of removal in this Court. On December 15, a CBSA officer denied Mr. Kamal's request for deferral.

II. Analysis

[9] A stay of removal is a temporary measure. It does not grant the right to reside in Canada. It simply preserves the status quo to give time to this Court to fully review Mr. Kamal's case: see

the discussion in *Singh v Canada (Citizenship and Immigration)*, 2021 FC 846 at paragraphs 15–18 [*Singh*].

[10] Motions for stay of removal are decided according to the well-known three-part test for interlocutory injunctions: *RJR – Macdonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR*], and *R v Canadian Broadcasting Corp*, 2018 SCC 5, [2018] 1 SCR 196. The Court must determine whether: (1) the applicant has shown that the underlying application raises a serious issue; (2) the applicant will suffer irreparable harm if the stay is not granted; and (3) whether the balance of convenience favours the applicant.

[11] As it is grounded in equity, the application of this test is highly contextual and fact-dependent and the overarching goal is to "do justice as between the parties:" *Surmanidze v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1615 at paragraphs 28 and 35 [*Surmanidze*]. This means that the test should not be viewed as a flowchart or computer algorithm in which questions can only be answered in a binary manner and the result flows mechanically: *Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc*, 2011 SKCA 120 at paragraph 26; *Monsanto v Canada (Health)*, 2020 FC 1053 at paragraph 50. Rather, "strengths with respect to one factor may overcome weaknesses with respect to another": *Singh*, at paragraph 17. The Court must weigh all the relevant factors in favour or against the granting of interlocutory relief, and the *RJR* test is meant to guide the Court in that process.

A. *Serious Issue*

[12] Mr. Kamal's application for judicial review raises two distinct issues, which must be analyzed separately and according to different standards.

[13] In most cases, the serious issue component of the *RJR* test is a low threshold. The applicant need only show that the claim is neither frivolous nor vexatious: *RJR*, at 335. This low threshold reflects the "difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding": *ibid.*

[14] However, when the underlying application targets a decision refusing deferral, the motion for stay of removal seeks the same remedy as the underlying application and is often the final determination of the matter. In these circumstances, the first prong of the *RJR* test is applied more rigorously and the applicant must show "quite a strong case" and not simply a "serious issue:" *RJR*, at 338–339; *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paragraphs 66–67, [2010] 2 FCR 311 [*Baron*]; *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 at paragraph 10, [2001] 3 FC 682 [*Wang*].

(1) Deferral Decision

[15] The Minister concedes that the deferral decision raises a serious issue on the elevated standard. I agree with this concession. It is apparent that the officer conflated Mr. Kamal's "TR to PR" application with an ordinary H&C application and applied the principles that have been

developed for situations where deferral requests are based on last-minute H&C applications. Moreover, the officer's statement that Mr. Kamal's application was untimely is difficult to understand. The use of standard processing times for H&C applications in the officer's reasoning is accordingly erroneous.

(2) Enforceability of Exclusion Order

[16] The second issue is whether the exclusion order issued against Mr. Kamal is enforceable, given that Mr. Kamal's visitor status was subsequently restored. To simplify somewhat, Mr. Kamal argues that the restoration cured any previous breach of the law. On his part, the Minister argues that the restoration was granted in error (although it does not appear to have been formally rescinded) and cannot confer any rights on Mr. Kamal. The Minister also argues that Mr. Kamal has lost any right to remain in Canada as a result of the refusal of his application for extension on December 20, 2022.

[17] At the hearing of this motion, the Minister argued that the elevated standard of "quite a strong case" applied to this issue. I am not persuaded. The rationale behind requiring "quite a strong case" is the "congruence of the relief sought": *Wang*, at paragraph 10. In other words, a motion for a stay and a request for deferral seek exactly the same thing. In contrast, where the underlying application does not challenge a negative deferral decision, this Court consistently applies the lower threshold when a stay of removal is sought, even though the ultimate goal of the applicant is to avoid removal. This is illustrated by cases involving both a deferral and another type of decision, such as *Ceja Corona v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 269 at paragraphs 17–19; *Abu Aldabat v Canada (Citizenship and*

Immigration), 2021 FC 277 at paragraph 24; *Singh Warring v Canada (Citizenship and Immigration)*, 2022 FC 1332 at paragraph 17. Thus, I will apply the lower threshold to the issue of the enforceability of the exclusion order.

[18] The Minister concedes that the issue is serious on the lower threshold. Indeed, the enforceability of the exclusion order involves a complex interplay between various provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], and the *Immigration and Refugee Protection Regulations*, SOR/2002-227. It would be impossible, in the short time before Mr. Kamal's scheduled removal, to conduct a complete review of the issue. Accordingly, the first step of the *RJR* test is met with respect to this issue.

B. *Irreparable Harm*

[19] The second branch of the *RJR* test focuses on the consequences of not granting interlocutory relief. Will the applicant suffer irreparable harm if the status quo is not maintained? In other words, is it necessary to stay Mr. Kamal's removal to ensure that a meaningful remedy will be available if his application before this Court is ultimately successful?

[20] In this regard, Mr. Kamal first argues that he is at risk of losing the benefit of his "TR to PR" application if he is removed from Canada.

[21] In the context of motions for stay of removal, "[t]he existence of a pending H&C application has often been held not to constitute irreparable harm": *Palka v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 165 at paragraph 14. Likewise, the fact that the

underlying proceeding may become moot if a stay is not granted does not automatically give rise to irreparable harm: *Palka*, at paragraph 20. Rather, each case must be assessed on its specific facts: see, for recent examples, *Kambasaya v Canada (Citizenship and Immigration)*, 2021 FC 664; *Adeyemi v Canada (Citizenship and Immigration)*, 2021 CanLII 103629; *Estey c Canada (PSEP)*, 2022 CanLII 68108. Moreover, the magnitude of the harm involved should be assessed at the third stage of the *RJR* test, the balance of convenience: *Pimentel Dos Santos v Canada (Citizenship and Immigration)*, 2022 FC 765 at paragraph 15.

[22] In this case, no parallel may be drawn with cases involving a last-minute H&C application. More often than not, the applicants in these cases have had the substance of their claims reviewed by specialized decision makers, such as the Immigration and Refugee Board and PRRA officers, and the H&C application is an ultimate effort to remain in Canada. Mr. Kamal's situation is entirely different. His "TR to PR" application was submitted at the earliest opportunity and has been pending for 18 months despite a stated average processing time of 7 months in December 2021. This application is not meant to reargue a failed application for refugee status or PRRA.

[23] Rather, given Mr. Kamal's highly specific and complex immigration situation, I conclude that there is a significant risk that his removal would affect the availability of a meaningful remedy. Mr. Kamal seeks to access an exceptional program designed to recognize the important contributions immigrant workers made during the COVID-19 pandemic. One requirement of this program is that the applicant must be in Canada. Whether there is any avenue for Mr. Kamal to be relieved of this requirement is highly uncertain. Hence, if he were to be removed, there is a

significant likelihood that he would lose the benefit of his application and any realistic possibility of returning to Canada.

[24] An additional element deserves consideration. On December 21, 2022, Mr. Kamal received a request for additional information regarding his work hours during the three years preceding his “TR to PR” application. This tends to show that a decision on this application is imminent. Moreover, this request lists the requirement for the program, one of which is that the applicant must be in Canada. This underscores the prejudice that would flow from Mr. Kamal’s removal.

[25] Given these exceptional circumstances, Mr. Kamal has shown that he would suffer irreparable harm if he were removed from Canada on January 1st. I acknowledge that the harm that Mr. Kamal would suffer is less serious and weighs less in the balance than, say, a threat to life. Nevertheless, this harm is irreparable in the sense that a judgment favourable to Mr. Kamal on the application for judicial review is unlikely to afford him a meaningful remedy. To paraphrase my colleague Justice John Norris, key circumstances relevant to Mr. Kamal’s “TR to PR” application “would have changed in material ways that cannot be undone or otherwise compensated for”: *Kambasaya*, at paragraph 36.

[26] Accordingly, I need not address the issue of whether being removed pursuant to an unenforceable removal order automatically constitutes irreparable harm.

C. *Balance of Convenience*

[27] At this last stage of the *RJR* test, the Court must weigh the harm the applicants would suffer if the stay is denied and the harm to the public interest if the stay is granted, as well as any other relevant consideration. In this regard, one must begin by acknowledging the public interest in the prompt removal of persons who remain in Canada beyond the period authorized for their stay. This "goes to the wider public interest in ensuring confidence in the integrity of the immigration program as a whole": *Surmanidze,* at paragraph 56.

[28] This public interest is stronger in cases where the applicant has engaged in criminal conduct or evaded the application of immigration laws. Conversely, the lack of a criminal record and compliance with immigration laws weighs in an applicant's favour.

[29] In this case, there is every indication that Mr. Kamal's conduct has been irreproachable and that he has made every conceivable effort to regularize his status in Canada. These efforts were made in the context of the many disruptions caused by the COVID-19 pandemic. This weighs in his favour.

[30] To this we must add the irreparable harm Mr. Kamal would suffer upon being removed. While this harm is not at the high end of the spectrum, it nevertheless carries significant weight, as the course of Mr. Kamal's life will be profoundly affected. I would add that the public interest pertains not only to the prompt removal of persons without status, but also to the prompt and accurate treatment of applications made pursuant to the Act: see, by way of analogy, *Williams v*

Canada (Public Safety and Emergency Preparedness), 2010 FC 274 at paragraph 36, [2011] 3 FCR 198; *Surmanidze*, at paragraph 57. As I mentioned earlier, there are serious issues as to whether Mr. Kamal's applications have been handled in that way.

[31] Moreover, what is at stake is a program designed to recognize the significant contribution made by foreign nationals who provided essential services during the COVID-19 pandemic. As my colleague Justice Shirzad Ahmed wrote in *Mohammed v Canada (Citizenship and Immigration)*, 2022 FC 1 at paragraph 43, Canadian society owes an important moral debt to them. It follows that there is an important public interest in the prompt and appropriate processing of their applications.

[32] Therefore, the considerations favouring a stay outweigh those favouring Mr. Kamal's immediate removal.

[33] Mr. Kamal also argued that his situation has been largely caused by the inability of the Department of Immigration, Refugees and Citizenship [IRCC] to provide accurate information and to process his applications in a timely manner. I do not have all the information nor the time needed to analyze fully Mr. Kamal's interactions with IRCC and CBSA. As I am able to decide this motion on other grounds, I will say nothing further about this and I will resist the temptation to find literary analogies for Mr. Kamal's predicament.

III. Disposition

[34] As Mr. Kamal has met all branches of the *RJR* test, his motion for a stay of his removal will be granted.

ORDER in IMM-12752-22

THIS COURT ORDERS that:

1. The motion is granted.

2. The applicant’s removal from Canada is stayed until the application for judicial review is decided.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Jennifer Dagsvik	FOR THE APPLICANT
Bradley Gotkin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Newcomer Legal Clinic Thunder Bay, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT